Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

Donald Bram,

Petitioner,

-vs-

The City of Cleveland,

Respondent,

-vs-

Commercial Demolition,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Ohio

# Petition for Certiorari

Donald BRAM
4039 Colony Rd.
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(216) 381-6526

Petitioner, *pro se.**

## Questions Presented for Review

I. WHETHER THE PROCEDURAL DUE PROCESS CLAUSE CONTAINED IN THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION WHICH PROTECTS THE RIGHT OF A PRIVATE LAND OWNER TO NOTICE AND AN OPPORTUNITY TO BE HEARD IN COURT PRIOR TO THE CONFISCATION AND SUBSEQUENT DEMOLITION OF HIS COMMERCIAL PROPERTY BY LOCAL STATE GOVERNMENT MAY LAWFULLY BE CIRCUMVENTED BY THE *EX PARTE* DECLARATION, PURSUANT TO LOCAL ORDINANCE, THAT THE SAME CONSTITUTES A PUBLIC NUISANCE?

II. WHETHER THE CONFERRAL OF STATE POLITICAL SUB DIVISION TORT IMMUNITY REQUIRES A DETERMINATION OF THE FACTUAL MERITS IN A CIVIL RIGHTS CASE EVEN IF THE SAME IS BASED UPON ONLY THE PLEADINGS AND IF SO, DOES THIS PRESERVE THE ALLEGED MERIT BASED QUESTION FOR HIGHER REVIEW UNDER THE SUPREMACY AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES?

III. WHETHER THE CIVIL RIGHTS ACT OF 1871,

CODIFIED AS 42 USC SECTION 1983 IS THE SOLE AVAILABLE REMEDY FOR FEDERAL CIVIL RIGHTS VIOLATIONS BY LOCAL STATE GOVERNMENT RESPECTING THE WRONGFUL DECLARATION OF NUISANCE AND SUBSEQUENT DEMOLITION OF PRIVATE PROPERTY THERETO WITHOUT DUE PROCESS OF LAW?

## List of Parties

The Party Plaintiff-Petitioner is one Donald BRAM of 4039 Colony Rd., South Euclid, Ohio 44121. *Michael Terrence Conway, Esq., Ohio Reg. No. 0058413, of Michael Terrence Conway and Associates Co., 18848 Canyon Rd., Fairview Park, Ohio 44126, has authored and written this brief as advisory Counsel on 96 hours notice. Attorney Conway was not Appellate Counsel and will be entering formal appearance at a later date pending compliance with requirements of Sup.Ct. Rule 5.

The First Party Defendant-Respondent is the City of Cleveland, Ohio, represented by the Director of Law, Room 106, City Hall 601 Lakeside Avenue, Cleveland, Ohio 44114.

The Second Party Defendant-Respondent is the City of Cleveland's authorized agent Commercial Demolition, represented by Ward & Associates, 1265 West Sixth Street, Fourth Floor, Cleveland, Ohio 44113.

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## Opinions Below

The Opinion of the Ohio Supreme Court was reported in *Bram v. Cleveland*, 71 Ohio St. 3d 1218 (15 Feb, 1995). The case there was on review from the Eighth District Court of Appeals located in Cuyahoga County, Ohio, case cited as, *Bram v. Cleveland*, 97 Ohio App. 3d 718 (9 SEP, 1993). Copies of the opinions below are attached as Appendices A and B, respectively.

## Jurisdiction

As noted above in "Opinions Below", the judgement of the Ohio Supreme Court was entered on 15 FEB 95. The U.S. Supreme Court's rule setting a 90 day time limit for filing expires on midnight Tuesday, 16 MAY 95. (U.S. Sup. Ct. Rule 13.1). Jurisdiction on the merits is brought pursuant to 28 USC Section 1257(a) which states in part that: "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by wit of certiorari where ... the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States..." Jurisdiction is further Probable pursuant to U.S. Supreme Court Rule 17.1(c), "Considerations Governing Review on Certiorari", to wit: "(w)hen a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

## Statutory and Constitutional Provisions Involved

Due to length and complexity, the pertinent state statutory provisions in issue are set forth in Appendix C. I to C.4, attached. However, for quick reference, the total statutes in issue are:

1. The 14th Amendment to the United States Constitution;
2. The Supremacy Clause contained in Article VI of the United States Constitution;
3. Cleveland Municipal Ordinance Section 3103.09;
4. Ohio Revised Code Section 2744.01,et seq.
5. Title 42, United States Code, Section 1983.

## Statement of the Case

### Generally

The case below was originally filed on 26 JULY 90 in the Cuyahoga County, Ohio Court of Common Pleas. The Complaint was amended on or about 1 FEB 91, and then again on 6 AUG 91. The cause of action alleged in the Second Amended Complaint was not titled in a nominal fashion, but averred that "on or about 8 OCT 89, a fire took place" at 2703 East 55th Street in Cleveland, Ohio in which "said property was partially burned" and leaving the "1st floor walls intact." The Plaintiff further alleged that the Defendant City of Cleveland acting through a contractor demolished the building without notification, or allowing him to make necessary repairs. The Second Amended Complaint says further that the "New Party Defendant Commercial Demolition, demolished said property under (an) order from the Defendant City of

Cleveland." The Plaintiff alleged that the Defendant City of Cleveland denied Plaintiff his due process of law and "his rights" guaranteed by the Ohio and United States Constitution "by failing to notify the plaintiff that his building was going to be demolished prior to its demolition." Plaintiff sought, *inter alia*, $500,000.00 in damages and in effect jointly and severally from the City and Commercial Demolition. In reply, the said Defendant's denied liability under various theories including state political subdivision immunity. The Defendant City filed a counter-claim against the Plaintiff seeking restitution for the cost of demolition on 17 SEP 92. Defendant Commercial Demolition also filed a counter-claim on 14 AUG 91. Discovery was requested and had. Throughout the course of litigation, motions for summary judgment and replies thereto were pending as early as 20 JUNE 91 when the Defendant City filed a Motion for Summary Judgment pursuant to Ohio Civil Rule 56 (c). Commercial demolition

filed a Motion for Summary Judgment on 23 JAN 92. After the last reply brief was served on the parties-Defendant by Plaintiff on 19 FEB 92, the Trial Court granted both Defendant's Summary Judgment Motions on 12 MARCH 92. An Appeal to the Eighth District Court of Appeals was filed on 7 APRIL 92. After the Trial Court's decision was affirmed on 9 SEP 93, an appeal was taken to the Ohio Supreme Court which affirmed the Court below by dismissing the appeal over dissent as improvidently allowed on 15 FEB 95.

Prior to Ohio Supreme Court action, the Eighth District affirmed the Trial Court's decision on the basis of finding that in light of the fact that the Plaintiff's constitutional claim was raised for the first time in a second amended complaint, it was insufficient to avoid the City's governmental tort immunity defense, and that the charge for demolition costs against Plaintiff were proper. *Bram v. Cleveland*, 97 Ohio App. 3d 718 (1993), syllabus. The Court determined

that in effect, the Plaintiff was attempting to avoid dismissal on political subdivision tort immunity grounds by amending the complaint after seeing the City's motion for summary judgment alleging the propriety of the same. *Id.* at 721. Yet in its decision, there was no reference made to a rule of procedure that refused the Plaintiff an opportunity to change the nature of his case to avoid dismissal, after the trial court expressly granted that opportunity by allowing leave to amend. Of particular importance, however, is the Eighth District's determination that "(t)he constitutional issue raised by appellant does not raise a question of federal law... " *Id.* The Eighth District further noted that summary judgment was granted below solely on the question of immunity. *Id.* at 722. The other assignments of error however, were based upon a determination that the factual merits, to wit, the propriety of having the Plaintiff pay the Defendant Commercial Demolition's' bill were uncontested. *Id.* at 722.

**Specifically**

On closer examination, we see that the controlling facts on summary judgment and hence first appeal were that Plaintiff did not receive notice of the condemnation of his said property from the Defendant City until three days after the said property had been demolished. The property was demolished because of alleged structural damage purportedly making the whole unsafe and a public nuisance. The Plaintiff's expert disagreed claiming that the property in issue was in effect salvageable in its burned out condition save the roof. (Plaintiff-Appellant's Brief to the Eight District Court of Appeals at 4-5.) The Defendant City took the position contrary. (Appellee Cleveland's Brief to the Eighth District Court of Appeals at 1-3). The Defendant-City claimed that the "City did not issue a formal notice of condemnation and declaration of public nuisance regarding (Plaintiff's) structure until or about (17 OCT 89)" or about one week after the fire. Demolition without notice was allegedly had "because of the divergent interests of the City

and the (Plaintiff) and the City's determination that an emergency situation was presented by the condition of the fire-destroyed structure." As noted, the City and Commercial both raised political subdivision tort immunity arguments in their summary motion. In particular, Commercial argued that "Bram's attempt to allege federal constitutional violations fails as a matter of law since his claims are so vague that they do not adequately state a claim against commercial and are actually based on alleged violations of state law procedure (and) not federally protected rights."

Citing cases alleging a cause of action under 42 USC Section 1983 relating to qualified immunity defenses, Defendant Commercial then claimed that the complaints made by the Plaintiff were not actionable because they did not amount to an allegation of a violation of federally protected rights under color of law. The import of Commercial's arguments indicated that the only method of alleging a federal constitutional

tort is pursuant to 42 USC Section 1983. (Appellee Commercial's Brief to the Eighth District Court of Appeals at 9). Defendant Commercial further argued, although out of place, that the Defendant City's "need to protect its citizen's outweighed the property owner's interests in notice of the impending action." (*Id.* at 10). Commercial then claimed that the Plaintiff merely alleged in the Second Amended Complaint that the City was negligent and that as Commercial was acting merely as the City's contractor, it was entitled to the same cloak of immunity as the City pursuant to Ohio Revised Code Section 2744.02 which states:

"(a)political subdivision is not liable in damages in a civil action for injury ... or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

The basis for Commercial's conclusion

could be analogized to that of the government contractor defense to suits under the Federal Tort Claims Act such as expounded upon in *Boyle v. United Technologies Corporation,* 108 S.Ct. 2510 (1988). With respect to the facts below, Commercial argued that there was no factual dispute that Plaintiff's building could not have been salvaged, but that the case could be decided as a matter of the law of Ohio political subdivision immunity.

The Defendant City on the other hand urged on first appeal that summary judgment was proper because "where a building fails to comply with the building code requirements and is in a dangerous and unsafe condition, it can be razed by municipal officials when properly authorized by ordinance." (Appellee Cleveland's Brief to the Eighth District Court of Appeals at 5). Cleveland Municipal Ordinance Section 3103.09 makes the effective attainder and states in part that: "All buildings or structures which are injurious to or a menace to the public health, safety or welfare, or are structurally unsafe ... or which constitute a fire

hazard ... are severally, for the purposes of this Building Code, declared to be "unsafe structures." All such unsafe structures or conditions are hereby declared to be public nuisances..." The same Code Section at part (i) declares in part that "(i)n cases of emergency which, in the opinion of the Commissioner, involve immediate danger to human life or health, the Commissioner shall properly cause the building, structure, or portion thereof to be made safe or removed." The Defendant City claimed that an emergency existed due to the condition of the said building. (Appellee Cleveland' Brief to the Eighth District Court of Appeals at 6-7). The Plaintiff took exception to the facts constituting an alleged emergency and the need for immediate responsive action by the City. (Plaintiff-Appellant's Brief to the Eight District Court of Appeals at 9-10). On first appeal, the Plaintiff-Appellant noted that Cleveland Municipal Ordinance Section 3103.09(e)(1) notes in part that "(w)henever the Commissioner finds a building structure or portion thereof to be unsafe and determines it to be a

public nuisance, he shall forward by certified mail to the owner, agent or person in control of such building structure or portion thereof ... a written notice of violation stating the defects thereof. Such notice shall require the owner within a stated time to abate the nuisance condition ... by correction of the violations and defects to the minimum standards of the Codified Ordinances of Cleveland, Ohio..." The Plaintiff-Appellant complained that he did not have a chance to make his alleged unsafe building safe, pursuant to ordinance. In reply the Defendant City did not squarely address this latter code provision in its brief on the merits but merely claimed that the presence of an emergency, effectively declared *ex parte* by a local government official pursuant to said statute, superseded any notice provisions otherwise due the Plaintiff. (Appellee Cleveland's Brief to the Eighth District Court of Appeals at 8). In light of this, the combined issues to be addressed here is whether or not the State Courts of Record below permitted the Defendant-Respondent's to circumvent the Due Process Clause

of the Fourteenth Amendment by their improper reliance upon said statute conferring political subdivision tort immunity, and a local ordinance granting the Respondents extraordinary discretion to demolish private real property without notice and the requirements of a merits hearing.

Petitioner says further that resolving the case below by attempting to avoid the merits with a determination of state immunity was unconscionable in light of the guarantees contained in the Due Process Clause, the requirements of the Supremacy Clause, and renders an impossible result. For example, the claimed failure to determine the factual merits of the case *sub judice* by the State Courts should deprive them of the power to confer immunity from civil suit altogether. *See*, Ohio Revised Code Section 2744.02. However, as immunity was in fact conferred;--the factual merits must, at least out of necessity have been addressed, - even if only by consideration of the Petitioner's amended pleadings *arguendo*.

Accordingly, the factual basis for the grant

of immunity by the trial court and the ratification of that opinion by the Eighth District and the Ohio Supreme Court leads the Petitioner to aver now that the wrongful deprivation of his real property without due process of law is justicable on petition for certiorari.

Lastly, the Petitioner notes that he does not raise the question of the applicability of the civil contractor immunity defense *per se*. There is also no attempt to resolve the factual dispute about whether or not the Petitioner could have in fact salvaged his building, although it is clear that he does in fact believe that. The questions presented are matters of law.

## Arguments in Favor of Issuance of the Writ

### I

THE PROCEDURAL DUE PROCESS CLAUSE CONTAINED IN THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION WHICH PROTECTS THE RIGHT OF A PRIVATE LAND OWNER TO NOTICE AND AN OPPORTUNITY TO BE HEARD IN COURT PRIOR TO THE CONFISCATION AND SUBSEQUENT DEMOLITION OF IRS COMMERCIAL PROPERTY BY LOCAL STATE GOVERNMENT MAY NOT LAWFULLY BE CIRCUMVENTED BY THE *EX PARTE* DECLARATION, PURSUANT TO LOCAL ORDINANCE, THAT THE SAME CONSTITUTES A PUBLIC NUISANCE.

*In Fuentes v. Shevin*, 407 US 67, 67 (1971) this Court addressed the Constitutionality of Florida and Pennsylvania replevin statutes in light of the Procedural Due Process Clause of the Fourteenth Amendment. The laws in question were struck down on the grounds that, *inter alia*, the statutes were repugnant to the concept of fair play requiring notice of legal action initiated to take the property, and the meaningful opportunity to be heard at a hearing to determine the propriety of the legal action taken. *Id.* at 80-81. This Court determined that the purpose of the pre-deprivation hearing is to check the danger of arbitrary government decision-making

which could mistakenly deprive one of their private possessions. *Id.* at 81. Moreover, "(i)f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Id.* With respect to the sufficiency of "notice" then, this Court has held that "when notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Central Hanover Trust Co.*, 339 US 306, 315 (1950). Therefore, notice must be reasonably calculated to accomplish its purpose.

With respect to what constitutes "fair process", this Court held in *Mathews v. Eldridge*, 424 US 319 (1976) that "fair process" is deduced from examining the (1) importance of the individual interests involved, (2) the value of specific procedural safeguards to protect that interest, and, (3) the governmental interest in fiscal and administrative efficiency. In other words, what constitutes proper due process is to be determined from the facts and circumstances on

an *ad hoc* case by case basis.

Moreover, in the procedural due process context, this Court has held that a constitutional deprivation is not necessarily complete when the deprivation occurs; "it is not complete unless and until the State fails to provide due process." Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided.., and (again) whether it is constitutionally adequate." *Zinermon v. Burch*, 494 US 113, 126 (1990).

In some instances, procedural due process may be satisfied with a post-deprivation hearing. *Parratt v. Taylor*, 451 US 527, 538-539 (1980). This Court has held that the possibility of erroneous destruction of property may be outweighed by a danger to public health, justifying immediate action. *Fuentes*, 407 US at 90-91. However, this Court has held that although '(t)here are "extraordinary situations" that justify postponing notice and an opportunity for a hearing ... these situations ... must be truly unusual." *Id.* at 90. (citation omitted). In such

cases, the seizure has been declared reasonable because of the direct necessity to (1) secure an important governmental interest, (2) the need for prompt action, and that in light of the fact (3) "the State has kept strict control over its monopoly of legitimate force: (and) the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Id.*

Moreover, to be actionable, the alleged deprivation of due process must have been intentional and done under color of law. *Parratt*, 451 US at 543. To hold a municipality liable for the same, the deprivation must be the result of the conduct of the municipality itself through its policies, customs or conduct as executed by one ultimately chargeable with final policy decision-making authority. *Monnell v. New York Department of Social Services*, 436 US 658, 690-694 (1978); *Pembaur v. Cincinnati*, 475 US 469, 483 (1986); *St. Louis v. Praprotnik*, 485 US 112, 126-127 (1987).

A single act of unconstitutional conduct will suffice to find liability as long as the decision is one made from amongst various alternative policy choices. *Pembaur*. A pre-existing unconstitutional policy is enough, however. *Monnell; Oklahoma City v. Tuttle*, 471 US 808, 823-824 (1985).

Moreover, when a municipality has committed an actionable deprivation of a federally protected constitutional right, the same has no legitimate claim to qualified or official immunity. *Owen v. City of Independence*, 445 US 622, 635, 638, 650-657 (1979). The supremacy clause abolishes any claims to state sovereign immunity by a municipality in the face of a suit for a violation of federally protected civil rights. *Id.* 647-648. This is because the municipal defendant has no lawful discretion to choose to violate the U.S. Constitution. *Id.* at 649.

In the case at bar, the Petitioner's right to meaningful procedural due process has no doubt been violated. The Cleveland Municipal Ordinance in question requires that the Petitioner be given

a hearing and a chance to contest demolition of his property under emergency conditions prior to the same being had. *See*, Cleveland Municipal Ordinance Section 3103.09 (e) (1). In *Shimola v. Cleveland, 89* 0. App. 3d 505, 512 (1992), the Eighth District noted, when faced with similar facts and law, "(e)ven under emergency situations, the city could not demolish property without notice." Yet here, the Petitioner was not given notice of the pending demolition of his building, and the required predeprivation hearing was scheduled *after his building was demolished*. The City of Cleveland claimed in effect on appeal it did not have to follow any due process procedure under the circumstances of an alleged "emergency" caused by the presence of an alleged unsafe or dangerous building structure. However, the constitutional defect inherent in interpreting said ordinance in this fashion is that that permits unfettered discretion by city officers, who are certainly biased in Cleveland's favor. In such case they are not a neutral safeguard which can prevent an erroneous fact determination. For

example, when and if a building is actually unsafe and constitutes an "emergency" under Section 3103.09 necessitating demolition without a pre-deprivation hearing is a matter of opinion. Clearly, in light of this, if the City's reasoning on appeal goes unchallenged, there would be no adequate protection from erroneous property deprivations at all. All Cleveland must do to avoid tort liability for infringement of federal civil rights is to unilaterally declare an emergency exists at a particular parcel of real property. This Court held in *Fuentes and Eldridge* that due process requires more in the way of safeguards. Clearly, the public interest in possession of private property free from governmental interference is infringed when there is no adequate pre-deprivation safeguard in place, or if in place is not followed in practice. It is also clear Cleveland's interest in public safety is not the end of the inquiry when addressing sufficiency of due process. The evidence of record shows that no one was hurt by Petitioner's building after it was "torched." There was no

reason why Petitioner's building could not have been boarded up or fenced-off to protect the public from creation of an attractive nuisance to children, a home for vermin, or a residence for vagrants or criminals. See, Legislative Findings, Cleveland Municipal Ordinance 3103.09(a)(1), *et seq.* There was no reason why Petitioner could not have been notified of pending demolition, and allowed time to make his building safe, prior to the order of demolition being issued. Moreover, as factual matter, there exists little difference between the condition of a burnt-out building superstructure and a partially built new building at a City construction site. Yet it is clear that the City would not demolish the partially built new building to protect the public's health and safety. It is therefore clear the said Ordinance could not be interpreted, as was done, to install a City official with the *ex parte* power to declare an emergency and demolish private structures without notice and an opportunity to be heard first in a neutral forum. Any power possessed by the Defendant City to do the opposite, as claimed

in Appellee's Brief to the Eighth District would amount to a claim that it may legally violate the Fourteenth Amendment by virtue of an established municipal policy. *See,* Cleveland Municipal Ordinance Section 3103.09. As such, the Petitioner's underlying claims stand in light of *Monnell, Pembaur and Praprotnik,* and the City of Cleveland may not cloak itself in state law immunity to avoid paying damages. This Court should grant certiorari to (1) make it known that this conduct will not be tolerated, (2) to reverse the case below, (3) to determine the extent of a City's emergency powers to abrogate or suspend federal due process by the claim that an emergency exists necessitating the destruction of private real property, and to (4) strike down the said City ordinance as applied, presently and *prospectively.* The actions of the Respondent's pursuant to local ordinance are clearly repugnant to the Fourteenth Amendment Due Process Clause and prior decisions of this Court.

## II

THE CONFERRAL OF STATE POLITICAL SUB DIVISION TORT IMMUNITY INHERENTLY REQUIRES A DETERMINATION OF THE FACTUAL MERITS IN A CIVIL RIGHTS CASE EVEN IF THE SAME IS BASED UPON ONLY THE PLEADINGS AND THUS PRESERVES THE ALLEGED MERIT BASED QUESTION FOR FURTHER REVIEW UNDER THE SUPREMACY AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES.

*In Howlett by and through Howlett v. Rose*, 496 US 359, 357 (1990), this Court determined that "(u)nder the Supremacy Clause, state courts have a concurrent duty to enforce federal law according to their regular modes of procedure." "Such a court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a valid excuse. An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. A valid excuse may exist when a state court refused jurisdiction because of a neutral state rule of judicial administration, unless the rule is preempted by federal law." *Id.* (citations

omitted.). Municipal defenses to federal civil rights claims are controlled by federal law. *Owen*, 445 US at 647. State sovereign immunity turns on the nature of the claim, i.e. discretionary verses ministerial government action, and not its substantive subject matter. *See*, Ohio Revised Code Section 2744.01, et seq. The federal law is law in a State as much as laws passed by the state legislature. *Howlett*, 496 US at 380. A ruling of an inferior state court alleging that sovereign immunity bars the suit at hand raises questions about subject matter jurisdiction and the merits. Therefore, to reach the question as to whether a grant of immunity is proper, one must address the factual merits alleged at least in the Complaint. The Eighth District Court of Appeals below in *Bram* dismissed the Petitioner's case claiming that Second Amended Complaint sounded in state tort, and that therefore state political subdivision immunity defenses barred the claim *Bram v. City of Cleveland*, 97 Ohio App. 3d 718, 721 (1993). This decision was made in the face of the clear

allegation that the Petitioner's Federal Due Process rights had been violated by the wrongful taking of private property. *Id.* This decision was further made in fight of a local ordinance that ***demands*** that the Petitioner be given notice and an opportunity to be heard prior to the destruction of his building. *See,* Cleveland Municipal Ordinance, Section 3103.09 (e) (1). And we have seen that although the statute in question seems to facially guarantee due process, it is not being interpreted or applied that way by the City-Respondent who claims emergency government powers to destroy private property over-ride considerations of federal due process under the facts in the case *sub judice.* The Ohio Supreme Court refused to entertain resolution of this matter over dissent which declared "(t)his case could have defined a property owner's due process rights in instances where a political subdivision determines that the owner's property is a nuisance and that immediate demolition is necessary." *Bram v. City of Cleveland,* 71 Ohio St. 3d 1218, 1218 (1995). Similarly, in seeking to avoid the issue

at first appeal the Eighth District justified its decision by claiming that the Petitioner was attempting to avoid case dismissal based upon immunity grounds by claiming his federal rights were violated. Yet that Court pointed to no known rule of procedure that prohibits the Petitioner from amending his complaint to allege a *prima facie* federal cause of action. The ultimate substantive effect or import of the State court's action below is to refuse to enforce the Federal Constitution Due Process Clause contained in the Fourteenth Amendment by claiming that state political sub-division tort immunity bars the same. This Court in *Howlett* refused to countenance this behavior. Precedent dictates that we attempt to remedy the loss of federal procedural rights here after all state judicial resources are exhausted. The facts support the allegation that this case is ripe for review. Certiorari should be granted to allow the reversal of the Ohio State Court's rulings, and reinstatement of the petitioner's case for trial. Moreover, this action is not an isolated incident.

In *Shimola*, as noted *supra*, again, the Eighth District Court of Appeals stated when faced with similar facts, "(e)ven under emergency situations, the city could not demolish property without notice." The problem at bar existed there too, but was resolved differently. Accordingly, it is clear that in Petitioner's case, in the face of a local ordinance facially requiring the equivalent of federal due process, The Ohio Supreme Court and a state court of appeals denied the same for an arbitrary reason that runs afoul of the Supremacy Clause and the Due Process Clause in the Fourteenth Amendment. The State Court's have attempted to ratify the unconstitutional conduct of the Respondent Cleveland and its agent Commercial Demolition. This conduct cannot stand, and the ordinance in issue cannot be interpreted or applied in the unconstitutional ***manner*** it has been in Petitioner's case below.

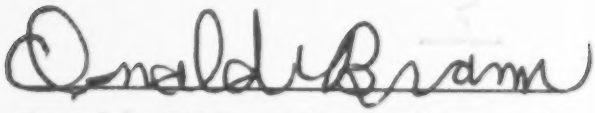
THE CIVIL RIGHTS ACT OF 1871, CODIFIED AS 42 USC SECTION 1983 IS NOT THE SOLE AVAILABLE REMEDY FOR FEDERAL CIVIL RIGHTS VIOLATIONS BY LOCAL STATE GOVERNMENT RESPECTING THE WRONGFUL DECLARATION OF NUISANCE AND SUBSEQUENT DEMOLITION OF PRIVATE PROPERTY THERETO WITHOUT DUE PROCESS OF LAW.

As a practicable matter, should it be raised that the Petitioner did not cite 42 USC Section 1983 in his Second Amended Complaint as the cause of action at bar, thereby allegedly making his constitutional claim pleadings insufficient, – it is clear that this argument fails as Constitutional torts existed long before the passage of the Civil Rights Act of 1871.

**Conclusion and Prayer**

In the light of the foregoing, the Petitioner respectfully requests that this Petition for Certiorari be granted for the reasons raised on the merits and in the jurisdictional statement.

Respectfully Submitted,



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# Appendix A

SUPREME COURT, JANUARY TERM, 1995
[72 Ohio St.3d]

| | | |
|---|---|---|
| BRAM | : | [Cite as *Bram* |
| Appellant | : | *v. Cleveland* |
| | : | (1995), |
| v. | : | 71 Ohio St.3d |
| | : | 1218.] |
| CITY OF CLEVELAND ET AL., | : | |
| Appellees | : | |

*Appeal dismissed as improvidently allowed.*

(No. 93-2147—Submitted January 11, 1995—Decided February 15, 1995.)

Appeal from the Court of Appeals for Cuyahoga County, No. 63530.

This cause is dismissed, *sua sponte*, as having been improvidently allowed.

**Douglas, Wright, Resnick, F.E. Sweeney** and **Cook, JJ.,** concur.

**Moyer, C.J.,** dissents and would affirm the judgment of the court of appeals.

**Pfeifer, J.,** dissents.

Pfeifer, J., dissenting. I dissent from the majority's decision that this case was improvidently allowed. This case could have defined a property owner's due process rights in instances where a political subdivision determines that the owner's property is a nuisance and that immediate demolition is necessary.

On October 8, 1989, a commercial building owned by appellant Donald Bram was damaged by fire. On October 10, 1989, a city engineer assessed the building's condition, and on October 12, 1989, a city-hired contractor began demolition of the building. Bram did not receive notice that the city intended to demolish his building until the building had been razed.

The city ordered the demolition pursuant to Cleveland Codified Ordinance 3103.09(i), which allows for demolition in emergency situations. That section imposes

no duty to notify the property owner prior to demolition.

I would have held that the ordinance violates property owners' constitutional rights to due process. While a full-blown hearing is not possible due to emergency safety concerns, the ordinance at least should require that the city make a good faith attempt to notify the property owner of its intent to demolish the structure prior to the actual demolition.

# Appendix B

**BRAM v. CLEVELAND**
Cite as (1993); 97 Ohio App.3d 718

**BRAM, Appellant,**

**v.**

**CITY OF CLEVELAND et al., Appellees.***

[Cite as *Bram v. Cleveland* (1993), 97 Ohio App.3d 718.]

Court of Appeals of Ohio, Cuyahoga County.

No. 63530.

Decided Sept. 9, 1993.

DYKE, Chief Justice.

Appellant, Donald Bram, brought this action for wrongful demolition against the city of Cleveland ("city") and Commercial Demolition, the company contracted by the city to do the actual demolition work, on July 26, 1990. Appellee, city of Cleveland, filed a counterclaim against appellant for the $2,000 cost of demolition.

Appellant is the owner of a commercial property located on East 55th Street in the city of Cleveland. On October 8, 1989 a fire substantially damaged the two-story brick structure. On October 10, the city engineer determined that the building "constituted an immediate hazard which should be removed." The emergency provision of Cleveland Codified Ordinance Section 3103.09(i) was invoked and the city contracted with Commercial Demolition to raze the structure. The necessary permits were obtained by October 12, 1989,

and the contractor's reports indicate that the work was eighty-five percent complete by October 16. A Condemnation Notice and a Declaration of Public Nuisance were sent to appellant on October 17. Appellant acknowledged receipt on October 19.

Appellant's second amended complaint alleged that his property was wrongfully demolished and that he did not have the opportunity to appeal from the Division of Building and Housing's determination because the building was demolished before he had notice of it. The second amended complaint also responded to the affirmative defense of governmental tort immunity raised by the city in its motion for summary judgment. The second amended complaint added paragraph five which reads as follows:

"Plaintiff further states that the defendant, City of Cleveland, denied the plaintiff due process of law, and vio-

lated his rights guaranteed by the Ohio and United States Constitution [*sic*] for defendant failed to notify the plaintiff that his building was going to be demolished prior to its demolition."

Commercial Demolition subsequently filed its motion for summary judgment. The lower court granted both motions for summary judgment and the city's counterclaim for $2,000. Appellant appeals from that decision and asserts four assignments of error for our review.

I

"The trial court erred by failing to find that the defendant-appellee is not immune from liability for plaintiff-appellant's claims pursuant to Ohio Revised Code section 2744.01, for he was denied due process of law and his rights under the United States Constitution were violated."

[1] Appellant argues that the consti-

tutional claim asserted in paragraph five of his second amended complaint is sufficient to invoke an exception to governmental immunity under R.C. 2744.09, which states:

"This chapter does not apply to, and shall not be construed to apply to, the following:

* * *

"(E) Civil claims based upon alleged violations of the constitution or statutes of the United States * * *."

The lower court based its decision on *Cleveland v. Wescon Constr. Corp.* (Aug. 23, 1990), Cuyahoga App. No. 57405, unreported, 1990 WL 121301. The city brought the action against Wescon, the property owner, to recover the cost of demolition. This case held that the defendant had not met his burden to identify the constitutional rights allegedly violated by the city in his counterclaim.

The court found that his claims sounded in tort, specifically, "trespass and malicious demolition resulting from alleged insufficient notice." *Id.* at 3. The defendant in *Wescon* actually raised the constitutional issues, not in his counterclaim, but in his brief in opposition to plaintiff's motion for summary judgment. The court determined that R.C. 2744.09(E) did not apply, and, therefore, the city was immune from liability under R.C. 2744.02.

Another wrongful demolition case recently heard by this court also found that R.C. 2744.09(E) was inapplicable. In *Broadview Mtge. Co. v. Cleveland* (Mar. 18, 1993), Cuyahoga App. No. 61939, unreported, 1993 WL 76884, the court stated:

"We find no merit to Broadview's claim that its constitutional rights were violated by the City's action, possibly voiding the sovereign immunity vested by

the statute. Broadview alleged no constitutional violations in its Complaint herein and only raised the issue in a vague and undefined way at the Common Pleas evidentiary hearing. Broadview's claims which sound in tort, i.e. trespass and wrongful demolition, 'do not amount to constitutional violations under R.C. 2744.09. Since [Broadview] failed to raise these claims in [its complaint], it could not at a later time raise them * * *.' *Wescon,* p. 3. We find that the trial court properly considered and followed this Court's decision in *Wescon.*"

These two cases involved facts slightly different from those in the case at bar. In the present case, after the city's motion for summary judgment was filed raising the issue of governmental immunity, appellant was granted permission by the court to file a second amended complaint in which he raised the consti-

tutional issue of due process. In spite of the fact that appellant raised the issue in his complaint, unlike Wescon and Broadview, the trail court relied upon this court's holding in *Wescon*.

We find that the lower court properly relied upon the prior case law in granting the motions for summary judgment. There is very little procedural difference between raising the constitutional issue in a twice-amended complaint and what the appellants did in *Wescon* and *Broadview*, raising the issue in a brief in opposition to a motion for summary judgment or in an evidentiary hearing. If this court allowed appellant to avoid the political subdivision tort immunity provisions by asserting the general proposition that the city violated his due process rights, we would essentially be subverting the purpose of the legislation. Appellant's complaint sounded in tort, a wrongful demo-

lition without proper notice, as required by the city's codified ordinances. We do not find that the vague assertion of a constitutional rights violation is enough to change the essential nature of that claim and to circumvent the purpose of the tort immunity provisions.

The two cases in which the courts did find exceptions to the political subdivision tort immunity under R.C. 2744.09(E), raised constitutional issues based upon substantial violations under federal law. See *Wohl v. Cleveland Bd. of Edn.* (N.D.Ohio 1990), 741 F.Supp. 688 (claim brought under Title VII of the Civil Rights Act of 1964), and *Bartholomew v. Fischl* (C.A.3, 1986), 782 F.2d 1148 (termination of employment amid public charges of dishonesty and incompetency without a hearing violated due process and retaliation infringed upon First Amendment right to free speech). The con-

stitutional issue raised by appellant does not raise a question of federal law as do the issues raised in the two cases cited above.

Appellant's first assignment of error is overruled.

II

"The trial court erred in not finding that defendant-appellee, city of Cleveland, failed to notify plaintiff-appellant of the building violations within a reasonable period of time."

III

"The trail court erred by granting summary judgment for defendant-appellees, city of Cleveland and Commercial Demolition as there are material issues in this case which are property for trail."

In granting both appellees' motions for summary judgment, the trial court cited to this court's opinion in *Wescon*. The lower court thereby indicated that

its basis for granting the summary judgments was not on the merits of whether the demolition was wrongful or proper under the city's ordinances, but, rather, on the theory of governmental immunity. In affirming the trial court's decision, it is not necessary for this court to reach the merits of appellant's arguments under these assignments of error.

Appellant's second and third assignments of error are overruled.

The lower court's decision to grant the summary judgment motions submitted by the city of Cleveland and Commercial Demolition is affirmed. The city's counterclaim for $2,000 was also properly granted by the lower court.

*Judgment affirmed.*

# Appendix C.1

**3103.09 Unsafe Structures; Violation and Remedial Notices; Cost Recovery.**

(a) *Legislative Findings.* Council of the City of Cleveland finds that:

(1) Structures which are vacant and open to entry at doors, windows or other points accessible to the general public:

A. Attract children to enter;

B. Become harborage for vermin;

C. Serve as temporary abode for derelicts, vagrants and criminals; and

D. Are likely to be damaged by vandals or set ablaze by arsonists.

(2) Unkept grounds surrounding such vacant, open structures invite the dumping of garbage and rubbish thereupon;

(3) Thousands of structures in this City are made of wood-frame construction which is more flammable than other building types;

(4) Thousands of structures in this City are situated on narrow lots and in

close proximity to one another, thereby increasing the risk of conflagration and spread of insect and rodent infestation;

(5) Population loss and economic decline experienced by the City in recent years has caused the incidence of vacant, open structures to increase significantly;

(6) Such vacant, open structures often become dilapidated because they are not repaired by the owners or persons in control of said structures;

(7) Structures that are vacant and open to entry depress the market value of surrounding properties;

(8) The existence of certain hazardous conditions may require a structure to be vacated; such conditions include but are not limited to:

A. Danger of structural collapse;

B. Inadequate heat or use of dangerous heating mechanism;

C. Danger of fire; and

D. Lack of plumbing in safe working order.

(9) Structures that remain boarded for an extended period of time contribute to blight, cause a decrease in neighboring property values, create targets for arson, and lead to the cancellation of homeowners' insurance for neighboring property owners.

(b) *Declaration of Nuisance.* All buildings or structures which are injurious to or a menace to the public health, safety or welfare, or are structurally unsafe, unsanitary or not provided with adequate safe egress, or which constitute a fire hazard, or which are vacant and open to public entry, or which are otherwise dangerous to human life or injurious to the public, or which in relation to existing use constitute a hazard to the public health, safety or welfare by reason of inadequate maintenance, dilapida-

tion, obsolescence or abandonment, are, severally, for the purposes of this Building Code, declared to be "unsafe structures." All such unsafe structures or conditions are hereby declared to be public nuisances. The public nuisance shall be abated by correction of the violations to the minimum standards of the Codified Ordinances of Cleveland, Ohio, 1976, Applicable City rules and regulations, the Ohio Revised Code, and Ohio Administrative Code including the Ohio Basic Building Code, or by demolition.

(d) *Examination and Condemnation.*

(1) The Commissioner is authorized to examine or cause to be examined every building or other structure reported to be unsafe or damaged or injurious to or a menace to the public, and shall make a written record of such examination.

(2) The Commissioner may designate as a public nuisance those particular struc-

tures or conditions found to be unsafe pursuant to subsection (b) hereof.

(3) The Commissioner may also declare that a nuisance structure which, due to its advanced state of dilapidation, substantial fire damage or structural infirmity, is an immediate hazard to human life or health, may only be abated by immediate repair and rehabilitation to the minimum standards of the Codified Ordinances of Cleveland, Ohio, 1976, applicable City rules and regulations, the Ohio Revised Code, and Ohio Administrative Code including the Ohio Basic Building Code, or by demolition.

(4) Whenever the Commissioner finds a vacant structure open to entry at doors, windows or other points accessible to the general public, he may cause the structure to be secured at those points of entry. The Commissioner shall be authorized at any time to enter upon the premises to

secure the structure in order to lessen the severity of the public nuisance. In securing such structure, the Commissioner may call upon any department, division or bureau of the City for whatever assistance may be necessary, or may, by private contract, secure such structure. Such securing shall not be deemed to constitute "effective boarding" pursuant to subsection (b) hereof, and it does not abate the nuisance condition of an unsafe structure, as declared pursuant to subsection (d)(2) hereof, unless so declared in writing by the Commissioner. Subsequent notice, issued pursuant to subsection (e)(1) below, shall include the fact that the Commissioner has found it necessary to take appropriate action to secure the structure.

(e) *Notice of Violation.*

(1) Whenever the Commissioner finds a building, structure or portion thereof to

be unsafe and determines it to be a public nuisance, he shall forward by certified mail to the owner, agent or person in control of such building, structure or portion thereof and to any mortgagee of record, written notice of violation stating the defects thereof. Such notice of violation shall require the owner within a stated time to abate the nuisance condition of such structure by correction of the violations and defects to the minimum standards of the Codified Ordinances of Cleveland, Ohio, 1976, applicable City rules and regulations, the Ohio Revised Code, and Ohio Administrative Code including the Ohio Basic Building Code, or by demolition and removal of the building, structure, or portion thereof.

(2) If the person to whom such notice and order is addressed is not found after a reasonable and diligent search, then such notice and order shall be sent

by certified mail to his tax mailing address, if available, as indicated on the County tax duplicate, and a copy of such notice shall be posted in a conspicuous place on the premises to which it relates. Such mailing and posting shall be deemed legal service of such notice.

(3) An owner or agent or person in control of such structure or building, a mortgagee of record, or a lien holder of record who has received a notice of violation or a notice to make corrections to the minimum standards of the Codified Ordinances of Cleveland, Ohio, 1976, applicable City rules and regulations, the Ohio Revised Code, and Ohio Administrative Code including the Ohio Basic Building Code, or to demolish and remove as provided for in this section, shall inform prospective purchasers, vendees, grantees, assignees, lessees, or land contractees thereof of such notice of violation or

the notice to make corrections, or to demolish and remove. No person shall transfer to a vendee, grantee, assignee, lessee, land contractee or any other transferee any interest in a building, structure or portion thereof after receiving a notice of violation to make corrections, or to demolish and remove the same, without first providing the transferee with a copy of such notice.

(f) *Vacating Building and Prohibiting Use.* The Commissioner may also require in the notice issued pursuant to subsection (e)(1) hereof that the building, structure or portion thereof be vacated and not reoccupied or used until the specified repairs and improvements are completed, inspected, and approved by the Commissioner. The Commissioner may cause to be posted at each entrance to such building or structure a notice as follows: "THIS STRUCTURE IS IN A DANGEROUS CONDITION AND

HAS BEEN CONDEMNED AND ITS USE HAS BEEN PROHIBITED BY THE COMMISSIONER OF BUILDING AND HOUSING." Such notice shall remain posted until the required corrections are made or demolition is completed. No person shall remove such notice without written permission of the Commissioner, nor shall any person use or enter the building or structure except for the purpose of making the required corrections or demolishing or effectively boarding the building or structure, or securing the structure pursuant to paragraph (d)(4) hereof.

(g) *Right to Appeal.* The owner, agent or person in control shall have a right to appeal from the notice and decision of the Commissioner as provided in this section and appear before the Board of Building Standards and Building Appeals at a specified time and place to show cause why he should not comply with such

notice. Any notice served by the Commissioner shall automatically become a final order if a written notice of appeal before the Board is not filed in the office of the Board within the time set forth in such notice from the Commissioner. In the absence of an appeal, all actions taken pursuant thereto shall constitute a valid exercise of the police powers of the City of Cleveland.

(h) *Noncompliance with Notice.* In case the owner, agent or person in control fails, neglects or refuses to comply with the notice to repair or rehabilitate, or to demolish and remove a public nuisance or unsafe building, structure or portion thereof, the Commissioner may take appropriate action to demolish and remove an unsafe structure, or may advise the Director of Law of the facts in the case, who, in turn, may institute appropriate action in the courts to cause correction

of the violations and defects, or demolition and removal, or effective boarding of such building or structure pending rehabilitation. The securing of rehabilitation permits for such building or structure shall not in and of itself bar the Commissioner from taking action to abate the nuisance.

The Commissioner may, with respect to any condemned structure, also take appropriate action to effectively board such structure, or to secure it pursuant to paragraph (d)(4) hereof. The Commissioner shall specifically state in writing his findings with respect to such structure, and shall determine whether to secure or to effectively board, based upon factors which may include the following: the distance of the structure from neighboring structures, the type of structure, the extent to which the structure is secured, the likelihood of vandalism or arson, the

extent of the deterioration, the economic likelihood of eventual rehabilitation of the structure, or cost of securing or effectively boarding the structure. Except as provided in subsection (i) hereof, the Commissioner shall give written notice informing the owner, agent, or person in control, mortgagee of record and lien holders of record of the City's intention to demolish and remove the unsafe building or structure at least thirty days prior to such intended action by the City. Such notice may be effective concurrently with the violation notice. A condemned structure, once effectively boarded by the owner pending rehabilitation that subsequently becomes open to entry, may then be demolished and removed, subject to the Commissioner giving written notice as stated in paragraph (e)(1) hereof and this subsection (h), upon a finding by the Commissioner that

the structure can no longer be effectively boarded.

(i) *Cases of Emergency.* In cases of emergency which, in the opinion of the Commissioner, involve immediate danger to human life or health, the Commissioner shall promptly cause the building, structure or portion thereof to be made safe or removed. For this purpose he may at once enter such structure or land on which it stands, or any abutting land or structure, with such assistance and at such cost as he deems necessary. He may order adjacent structures and premises to be vacated, and protect the public by an appropriate fence or such other means as may be necessary, and for this purpose may close a public or private way.

(j) *Costs.* Any and all expenses or costs incurred under this section for the removal, repair, alteration, securing or boarding of a building or structure shall

be paid by the owner of such building or structure. If the owner fails to pay for the costs within thirty days after receipt from the Director of Community Development of a statement of the charges and costs incurred therein, the Director may certify such amount to the Commissioner of Assessments and Licenses. The Commissioner of Assessments and Licenses shall make written return to the County Auditor of the action under this section with a statement of the charges for services, the amount paid for the performing of such labor and a proper description of the premises. Certification to the County Auditor is for the purpose of making expenses and costs a lien upon such lands, to be collected as other taxes and returned to the City with the General Fund, with special accounting thereof in accordance with RC 715.261.

Notwithstanding the method of collec-

tion set forth in this subsection, the Director of Law may take any action necessary to collect the costs of demolition or boarding from the owner or other responsible party. (Ord. No. 2370-87. Passed 1-25-88, eff. 2-1-88).

* * *

**3103.11 Restraining Order**

Whenever any person, firm or corporation fails, neglects or refuses to comply with a stop order issued under the provisions of Section 3103.07, or fails, neglects or refuses to comply with a notice to repair, rehabilitate or demolish a building or other structure declared unsafe under the provisions of Section 3103.09, and whenever any building or other structure is used or occupied so as to be in violation of, or not in conformity with, any provision of OBBC or this Building Code, the Commissioner or any other administrative officer having juris-

diction may, in his discretion, through the Director of Law, institute an appropriate action at law or in equity to restrain the execution of work in violation of this Building Code, to compel the removal of work executed in violation of this Building Code, and to prevent the occupation or use of such building or other structure.

# Appendix C.2

BALDWIN'S
**OHIO REVISED CODE**
ANNOTATED

Title 25
Courts
Appellate

Title 27
Courts
General Provisions
Special Remedies

Banks-Baldwin Law Publishing Company
West Publishing Company

**2744.01 Definitions**

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of his employment for a political subdivision. "Employee" does not include an independent contractor, does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been con-

victed of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2151.355 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the com-

mon good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to pro-

tect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, mainte-

nance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhib-

its one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a human services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not

include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunication or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop

work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any part, playground, playfield, indoor recreational facility, zoo, zoological park, bath, or swimming pool or pond, and the operation and control of any golf course;

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter

120. of the Revised Code;

(W) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statues, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the

state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant

to section 307.052 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, and county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

(1994 H 384, eff. 11-11-94; 1993 H 152, eff. 7-1-93; 1992 H 723, H 210; 1990 H 656; 1988 S 367, H 815; 1987 H 295; 1986 H 205, § 1, 3; 1985 H 176)

**2744.02 Political subdivision not liable for injury, death, or loss; exceptions**

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision

is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or propri-

etary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. The following are full defenses to such liability:

(a) A member of a municipal corporation police department or any other firefighting agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire,

proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506, or a driver's license issued pursuant to Chapter 4507, of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in section 3746.24 of the Revised Code, po-

litical subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in

section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code.

Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

(1994 S 221, eff. 9-28-94; 1989 H 381, eff. 7-1-89; 1985 H 176)

**2744.03 Defenses and Immunities**

(a) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial,

legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is im-

mune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of his sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2151.355 of the Revised Code, and if, at the time of his injury or death, the person or child was covered for pur-

poses of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or section 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;

(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Liability is expressly imposed upon the employee by a section of the Revised Code.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any

liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

(1994 S 221, eff. 9-28-94; 1986 S 297, eff. 4-30-86; 1985 H 176)

**2744.04 Limitation of actions; complaints**

(A) An action against a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action arose, or within any applicable shorter period of time for bringing the action provided by the Revised Code. This division applies to actions brought against political sub-

divisions by all persons, governmental entities, and the state.

(B) In the complaint filed in a civil action against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission in connection with a governmental or proprietary function, whether filed in an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, the complainant shall include a demand for a judgment for the damages that the judge in a nonjury trial or the jury in a jury trial finds that the complainant is entitled to be awarded, but shall not specify in that demand any monetary amount for damages sought.

(1985 H 176, eff. 11-20-85)

**2744.05 Damages**

Notwithstanding any other provisions

of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function:

(A) Punitive or exemplary damages shall not be awarded;

(B) If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to such ben-

efits. Nothing in this division shall be construed to limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds.

(C)(1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court

costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

(2) As used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(a) All wages, salaries, or other compensation lost by the person injured as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of such a person;

(b) All expenditures of the person injured or another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(c) All expenditures to be incurred in the future, as determined by the court, by the person injured or another person on his behalf for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary of the injury;

(d) All expenditures of a person whose property was injured or destroyed or of another person on his behalf in order to repair or replace the property that was injured or destroyed;

(e) All expenditures of the person injured or whose property was injured or destroyed or of another person on his behalf in relation to the actual preparation or presentation of the person's claim;

(f) Any other expenditures of the person injured or whose property was injured or destroyed or of another person

on his behalf that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

"The actual loss of the person who is awarded the damages" does not include any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss, and does not include any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

(1985 H 176, eff. 11-20-85)

**2744.09 Applicability of chapter**

This chapter does not apply to, and shall not be construed to apply to, the following:

(A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;

(B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

(C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;

(D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;

(E) Civil claims based upon alleged violations of the constitution or statues of the United States, except that the

provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

(1985 H 176, eff. 11-20-85)

# Appendix C.3

**THE FOURTEENTH AMENDMENT,**

**U.S. CONSTITUTION**

SECTION ONE

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

# Appendix C.4

## THE SUPREMACY CLAUSE, ARTICLE VI, U.S. CONSTITUTION

The Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

# Appendix C.5

**CIVIL RIGHTS ACT OF 1871;**

**42 US CODE SECTION 1983**

Every person who, under color of law of any statute, ordinance, regulation, custom, or usage of any state... subjects, or causes to be subjected, any citizen of the United States or other person within its jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law... or other proper proceeding.